IN THE HIGH COURT OF JUDICATURE, ANDHRA PRADESH
AT HYDERABAD

THURSDAY, THE FOURTEENTH DAY OF OCTOBER
TWO THOUSAND AND FOUR

PRESENT

THE HON'BLE MR JUSTICE B. SUDERSHAN REDDY

and
THE HON'BLE MR JUSTICE K.C. BHANU

WRIT APPEAL NO : 1692 of 2004

(Writ Appeal under Clause 15 of the Letters Patent against the Order dated 05/10/2004 in WP NO : 17919 OF 2004 on the file of the High Court.)

Between:

M/s. Engineering Projects (India) Ltd.,

(A Govt. of India Enterprise), 103 Vamshi Residency,

Yousufguda Check Post, Hyderabad-500 045,

rep. by its General Manager.

..... APPELLANT

AND

1 M/s. Singareni Collieries Company Ltd.,

rep. by its General Manager (Purchase), Kothagudem,
Khammam Dist.

2 Sri Suresh, S/o. not known to the petitioner,

General Manager(Purchase), M/s. Singareni

Collieries Company Ltd., Kothagudem, Khammam Dist.

3 M/s ABC Engineering Works, Block No. G-20, Plot No. 23, 24,

2nd Road, Jawahar Auto Nagar, Vijayawada - 520 007.

(R3 is impleaded as per Court Order dt. 14-10-2004 in
WAMP 2879 of 2004).

.....RESPONDENTS

For the Appellant: MR. D.V.SITARAMAMURTHY, Advocate.

For Respondent Nos. 1 and 2: MR. K.SRINIVASAMURTHY, Standing Counsel.

For Respondent No. 3: Mr. V. Tulasi Reddy, Advocate.

The Court made the following Judgment:

THE HON'BLE MR. JUSTICE B. SUDERSHAN REDDY

AND

THE HON'BLE MR. JUSTICE K.C. BHANU

WRIT APPEAL (SR) NO. 99643 OF 2004

JUDGMENT: (per Sri B. Sudershan Reddy, J)

The unsuccessful writ petitioner is the appellant in this appeal filed against the Order of a learned single Judge of this Court dated 05.10.2004 dismissing W.P No. 17919 of 2004 filed by it.

In response to the tender notification dated 10.09.2004 issued by the 1st respondent – M/s. Singareni Collieries Company Limited inviting tenders for Blast Hole Drilling, Blasting, Excavation, Loading, Transportation, Dumping etc., of Over Burden at Gauthamkhani Opencast Project, Kothagudem, the appellant submitted its offer which was accepted followed by a letter of intent dated 19.01.2004. The 1st respondent issued the Work Order to the appellant for execution of the work as per the terms and conditions mutually agreed by and between the parties.

The appellant herein was handed over the site on 13.03.2004. The total

duration of the contract is 36 months but under Clause 8 of the Work Order, a detailed month-wise work completion schedule has been prescribed.

It appears that since the date of commencement of the work, the appellant herein was unable to maintain the work schedule. The appellant was put on notice on more than one occasion about its poor performance. On 24.09.2004, the 1st respondent – Company required the appellant to explain on or before 30.09.2004 as to why the action deemed fit shall not be taken including that of termination of the order placed on it duly imposing penalties as per Work Order terms. In the said notice, it is *inter alia* alleged that since the date of commencement of the said work, the performance has been very poor. It is observed "please note that as on date against the mutually agreed scheduled quantity of 47.60 LBCM, the achievement is only about 8.70 LBCM (i.e. 18%). Further, it is regretted that the performance as against your latest commitment, vide letter cited under reference (17), the performance is only about 31%". The 1st respondent – Company felt that continuous poor performance of the appellant may have an adverse impact on achieving coal targets set for the project. The appellant submitted its explanation on 30.09.2004 *inter alia* explaining the difficulties faced by it in achieving the target. In its reply to the show cause notice, the appellant nowhere denied the allegation levelled against it that its performance has been very poor. The appellant accordingly requested the 1st respondent not to take any drastic action. The 1st respondent having noted the contents of the explanation submitted by the appellant herein and having found the explanation to be unsatisfactory terminated the contract. The impugned letter dated 01.10.2004 is to the following effect:

> "Please refer to correspondence cited above against our order for 285.00 LBCM of OB removal work including blast hole drilling & blasting at Gauthamkhani Opencast Project,

Kothagudem.

In response to our letter under reference (2) the explanation given by you vide your letter No. PCO/PMD/468/D1 dated 30.09.2004 is not satisfactory since it is nothing but reiterating the earlier promise with excuses. Despite several assurances given by you in the past, the performance of OB removal work continues to be very poor.

The continuous poor performance will have adverse impact on achieving the coal targets set for the project.

In view of the above, in exercise of clause No. 4 of the order and clause No. 12 of Annexure –A (enclosure to the order), the order No. KC.98 dated 19.01.2004 placed on you is hereby terminated with immediate effect duly imposing all the penalties as per the terms of the contract.

You are hereby advised to approach Project Officer, GK-OCP for joint survey on or before 11.10.2004 for finalisation".

Sri D.V. Sitharam Murthy, learned counsel for the appellant submits that the impugned action of the respondent – Company in terminating the contract is arbitrary and unfair and vitiated by extraneous considerations. The 1st respondent – Company being an instrumentality of the Sate is required to act fairly and all its actions are liable to be tested on the touch stone of Article 14 of the Constitution of India. Learned counsel submitted that even in the month of July, 2004, the 1st respondent – Company has floated a limited tender enquiry circulated to the select local private contractors to elicit their bids for carrying out the work awarded to the appellant and that singular fact is enough to hold that the 1st respondent – Company predetermined to terminate the contract even before the show cause notice was

issued. The 1st respondent – Company deliberately created a situation whereby the appellant became crippled due to non-release of funds and that has adversely affected the work schedule. Learned counsel placed reliance upon the decisions in **L.I.C. OF INDIA v. CONSUMER EDUCATION & RESEARCH CENTRE; DELHI SCIENCE FORUM v. UNION OF INDIA; DATTA ASSOCIATES PVT. LTD v. INDO MERCHANTILES PVT. LTD; ONKAL LAL BAJAJ v. UNION OF INDIA** and **ABL INTERNATIONAL LTD. v. EXPORT CREDIT GUARANTEE CORPN. OF INDIA LTD**.

There is no dispute whatsoever that the work entrusted to the appellant herein is regulated by the terms and conditions mutually agreed by and between the parties. The appellant herein was clearly put on notice that its offer has been accepted and the subject work is awarded for execution, as per the scope, terms and conditions, detailed in the Work Order dated 19.01.2004. The terms and conditions are not regulated by any statute or an instrument having the effect of a statute. The Work Order itself provides for termination of work, in case the progress of work is found to be unsatisfactory. Clause 4 of the Work Order *inter alia* says that the progress of work would be watched "for about one month and in case the progress is not satisfactory or if it is found essential to expedite the works, SCCL reserves the right to terminate the works with penalties as per order and consider the next technically competent offer to award part of the above work….". Clause 8 deals with the work completion schedule. It provides that the contractor should complete the work within 36 months by starting the work within one month from the date of Letter of Intent or one week from the date of handing over the site, whichever is later. The Contractor is required to execute the work without subletting or sub-contracting to others. Clause 9 specifically provides the month-wise schedules to complete the work within 36 months. The details are not required to be noticed except to note that the contractor was required to try to improve upon even those schedules given.

The record discloses that the respondent – Company cautioned the appellant herein on more than one occasion and required it to improve its performance, as it was found not maintaining the month-wise schedule to complete the work in 36 months. It is not as if the appellant herein was served with the show cause notice all of a sudden. The appellant every time made its own explanation about which we are not inclined to express our opinion. One of the reasons, according to the appellant, as to why it could not conform to the schedule is that the 1st respondent did not *bona fidely* discharge its part of the contractual obligation and that it did not disclose in full extent and particulars the hazardous and dangerous nature of the mine on which the work was to be turned out. The appellant realized that the subject work entrusted to it was already identified and designated as dangerous and unsafe or accident prone by the competent authority under the relevant statute. This information was particularly relevant in order to consider its effect on the schedule of progress. According to the appellant, this is one of the factors that resulted in slow pace of work on account of which the work schedules were disturbed. The appellant could not achieve the monthly wise target for the reasons beyond its control.

That according to the appellant these factors ought to have been taken into consideration before terminating the contract. The 1st respondent herein obviously invoked Clause 4 of the contract and exercised its right to terminate the work. That after continuous watching of the work, the 1st respondent found it to be totally unsatisfactory.

The learned single Judge found that the allegations made by the appellant, even if established may amount to breach of terms and conditions of the contract, but cannot be termed as ‘arbitrary exercise of power’. The learned Judge found that the dispute between the parties arises out of a concluded contract voluntarily entered into between the parties and no writ would lie to enforce the terms of the contract.

The learned Judge accordingly found that the question of arbitrary exercise of power does not arise where one of the contracting parties had invoked one of the terms of the contract resulting in termination of the contract. We are in complete agreement with the view taken by the learned single Judge.

It is unnecessary to burden this judgment with various pronouncements of the Supreme Court laying down parameters of judicial review in contractual matters. Suffice to refer to the latest judgment of the Supreme Court reported in *Abl International Limited's case* (5 supra) in which it is held that on a given set of facts if a Sate acts in an arbitrary manner even in a matter of contract, an aggrieved party can approach the court by way of writ under Article 226 of the Constitution and the court depending upon facts of the said case is empowered to grant relief. That as a rule in matters of contract the court's jurisdiction under Article 226 of the Constitution is not ousted. It is too late in the day to contend that the court's jurisdiction is ousted in matters of contract even where one of the contracting parties is a State or an instrumentality of the State. The question is one of exercise of jurisdiction. In the said judgment, it is observed "it is well known that if the parties to a dispute had agreed to settle their dispute by arbitration and if there is an agreement in that regard, the courts will not permit recourse to any other remedy without invoking the remedy by way of arbitration, unless of course both the parties to the dispute agree on another mode of dispute resolution". In the instant case, there is a specific clause in the agreement wherein both the parties have agreed that the dispute or difference of opinion between the 1st respondent and the contract "in respect of site plans, specifications, measurements, manner of execution or any thing connected with the work, not specially provided for, here in under the specification or in respect of meaning of any clause of the terms and conditions of Tender document shall be decided by 'CIVIL COURT' of competent jurisdiction and not by arbitration". The

parties have thus clearly agreed to resolve the disputes or differences amongst themselves through the medium of civil Court of competent jurisdiction.

The question whether the appellant herein could not stick to the work schedule on account of the reasons beyond its control and whether the defence offered by it is satisfactory or not cannot be gone into by this Court in exercise of its jurisdiction under Article 226 of the Constitution of India. The resolution of the dispute between the appellant and the respondent – Company involves enquiry and investigation into many disputed questions of facts. The proceedings under Article 226 are ill-suited for undertaking any such enquiry.

The action of the 1st respondent-Company in invoking Clause 4 for terminating the contract of the appellant is based upon the finding to the effect that the appellant despite several assurances given by it in the past failed to improve its performance, which was likely to have an adverse impact on achieving the coal targets set for the project. The question whether the performance of the appellant herein was satisfactory or not and whether despite several assurances given by it, the performance continued to be very poor cannot be decided in a judicial review proceeding. It is entirely a different matter that the respondent – Company may have acted in breach of terms and conditions of the contract but the same cannot be equated to that of arbitrary exercise of power. In *Bihar vs. Jain Plastics and Chemicals*, the Supreme Court held that "writ is not the remedy for enforcing contractual obligations. It is to be reiterated that writ petition under Article 226 is not the proper proceeding for adjudicating such disputes…..It is settled law that when an alternative and equally efficacious remedy is open to the litigant, he should be required to pursue that remedy and not invoke the writ jurisdiction of the High Court. Equally, the existence of alternative remedy does not affect the jurisdiction of the

Court to issue writ, but ordinarily that would be a good ground in refusing to exercise the discretion under Article 226."

One important factor in this case is required to be noticed by us, *viz.,* that even in the explanation, the appellant herein did not dispute that it failed to achieve the monthly target in accordance with the agreed schedule. No doubt, it had explained the reasons as to why the targets could not be achieved. The question whether the appellant herein committed any breach on account of its failure to comply with the work schedule cannot be gone into by this Court in exercise of its jurisdiction under Article 226 of the Constitution of India. Likewise, the question whether the 1st respondent herein acted in breach of terms and conditions in terminating the contract also cannot be gone into by this Court since it involves the interpretation of the terms and conditions of the contract. Any dispute relating to interpretation of terms and conditions of such a contract in realm of private law cannot be agitated in a writ petition. This is a matter required to be resolved as provided for by the contract or by civil Court, as the case may be. This Court by issuing a writ of Mandamus cannot restore the contractual obligations between the parties.

The mere fact that the 1st respondent was exploring the possibility of entrusting the work to any other person or persons by calling a limited tender enquiry itself would not vitiate the action in terminating the contract. The respondent – Company simultaneously was exploring the possibilities as to whom the work should be entrusted in case the appellant's performance continues to be unsatisfactory. The fact remains that the work was not entrusted during the subsistence of appellant's contract with the Company. Having regard to the nature of work, it cannot be said that the Company could not have simultaneously explored

the possibilities of entrustment of work to others while duly cautioning the appellant herein to improve its performance. We find no substance in the submission made by the learned counsel for the appellant in this regard.

For all the aforesaid reasons, we find no merit in this appeal. We are in complete agreement with the view taken by the learned single Judge. This order of ours shall not preclude the appellant herein to avail such remedies as may be available to it in law, in which event the matter shall be considered on its own merits uninfluenced by any of the observations made in this order.

The Writ Appeal is accordingly dismissed.

(B. Sudershan Reddy, J)

14..10..2004

(K.C. Bhanu, J)

ks

To

1 M/s. Singareni Collieries Company Ltd.,

rep. by its General Manager (Purchase), Kothagudem,
Khammam Dist.

2 Two CD copies.

3 M/s ABC Engineering Works, Block No. G-20, Plot No. 23, 24,

2nd Road, Jawahar Auto Nagar, Vijayawada - 520 007.

4 Sri Suresh, S/o. not known to the petitioner,

General Manager(Purchase), M/s. Singareni

Collieries Company Ltd., Kothagudem, Khammam Dist.